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United States Circuit Court of Appeals

In and for the Ninth Judicial District.

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Appellant,
vs.
B. T. DYER,
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Mr. DURBROW. May it please the Court: This case involves the question as to whether a partnership ever existed between the parties to the proceeding. That is the matter of primary importance. As a matter of secondary importance, we are called upon to argue some questions relating to an accounting, for the reason that the trial court held that the partnership did exist, and the matter was referred to a special master to take an accounting, and exceptions were taken by both parties to the accounting reported by the master.

It will be necessary for me, in the first instance, if you please, to call your Honors' attention to

the allegations contained in the complaint, because, as we proceed, we will find that it will be necessary to give particular reference to many of these allegations. I do not propose to read the complaint, but will direct the Court's attention to the salient features.

It is alleged that a partnership was formed for the general purpose of carrying on business together in operating oil bearing lands, and interests therein.

It is alleged in paragraph V of the complaint, and I choose, if you please, to read this entire paragraph:

> "That said agreement of partnership was wholly an oral one, and its terms are and were not reduced to writing."

I then next direct your Honors' attention to paragraph VII of the complaint, in which it is alleged that the parties would give their attendance and devote their entire time and attention to the business thereof, and to the furtherance and advancement of the partnership business and affairs to their mutual benefit and advantage. And that said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business.

It is alleged in the complaint that the defendant, in violation of the terms of the claimed partnership agreement, did not devote his entire time and at-

tention to the affairs of the partnership, but, on the other hand, devoted his entire time and attention to his personal business and affairs, to the detriment of said copartnership business, although it is alleged that the plaintiff at all times complied with the agreement, so far as he was concerned.

Now, we intend to show, if you please, as a brief outline of this argument, that no contract, oral or written, was ever executed between the parties relating to any partnership whatsoever.

We shall further argue that if it could possibly be held, under the facts as interpreted by the well-defined principles of law, that a partnership at any time did exist, that by mutual consent that partnership was terminated on the 30th day of May, 1919. That on this date there was an entirely new arrangement made between the parties, whatever their relations may have been prior to that time. We will direct the Court's attention to the evidence which shows that at this time any relations theretofore existing between the parties were entirely changed and that the appellant engaged in a separate and independent venture in Louisiana and agreed to carry appellee for an undefined interest therein, provided appellee would devote his entire time and attention to managing an independent business in Texas; that the appellee failed entirely to fulfill his obligations; that there is therefore a failure of consideration, a want of mutuality; and that as appellee had merely a contingent as

distinguished from a vested interest he is not entitled to recover.

Now, in the first instance, it becomes necessary to determine whether a partnership has been proven. We desire to show that even though we refer exclusively and entirely to the testimony of plaintiff himself, the appellee here, and take his evidence at its face value and give it full weight, that it is not sufficient to establish a partnership relation. And I might say parenthetically that I do not, although I will refer very largely to the testimony of the plaintiff in this case, wish to have the impression created that we do not place great dependence upon the testimony of the defendant in the case, which in a large measure contradicts and conflicts with the testimony given by the plaintiff. But, I propose, if your Honors please, to refer particularly, and almost exclusively, to the testimony of the plaintiff, to show that, under his own sworn testimony, there never was a partnership relation existing between the parties to the controversy.

At pages 109 and 110 of the direct examination, the plaintiff undertook to relate very minutely in response to questions put to him by counsel what the terms of this partnership were. I want to refer to page 120 of the transcript, where upon cross-examination he reiterated what he said upon his direct examination, and stated what were the sole and exclusive terms of the partnership agreement, and I am going to read from the transcript

very briefly, if your Honors please, because it is covered in a few words.

Mr. Dyer testified:

> "The sum of all that was said by Doan at that time"—that was the time in August, 1918, when the partnership was supposed to be formed— "in response to my suggestion that we go to Texas"— please bear in mind he was relating entirely to Texas, at that time, and not to any other place— "was that I stated to Doan, after I advised him what investigations I had made, 'I am going back anyway Larry, and I want you to come back with me', and Doan's reply was, 'I will come back with you and follow you up and hit the ball and back you up and we will divide the profits.' That was the sum of our many conversations."

On cross-examination he further testified, upon the same page:

> "What I said upon direct examination is all the arrangement that I ever had or ever made with Doan at any time with reference to a partnership between us. I did not have any other arrangement or understanding with Doan, except as I have testified."

And that testimony was that he was going back to Texas in any event, that he asked Doan to go back there to Texas with him, and Doan said for him to go back, and that he would follow him up and hit the ball, and that they would divide the profits.

Now, upon the trial in the lower Court, great stress was laid upon this testimony, and particularly upon that testimony so far as it related to the

division of the profits, and it was argued that that was the terms of a complete contract, and that because there was to be a division of the profits that the partnership relation was established then and there at that time. I want to cite to your Honors and read very briefly an excerpt from a decision in a case cited by the appellee in its brief filed in this Court, holding that any such language as was employed by the parties, or any such agreement as plaintiff claims was made, does not constitute a partnership. The Court says, in *Westcott v. Gilman,* 170 Cal. 568:

> "Appellant last contends that there may be a division of profits as a basis of fixing compensation, apart from and independent of a partnership. This, of course, is perfectly true. A division of the profits amongst employees is not an unusual thing in modern business. The employees receive a fixed compensation by way of wages or salary, and, in addition thereto, and as an inducement to more efficient service, are given a certain percentage of the net profits at stated intervals. This, of course, does not create a partnership. No more is a partnership created in that other large class of cases where leases of various kinds are made, the compensation to the lessor being based upon the profits which the lessee may derive from his holding. But while thus the element of profit-sharing does not alone and of itself establish a partnership, it is an essential element of every partnership, and it is an element present in this contract."

This decision clearly states the law and is in accord with the decisions cited in appellant's brief which hold in an agreement such as this all the

essential elements of a partnership are lacking. In substance the agreement was that Dyer was going to Texas anyhow and that Doan said he would follow, back Dyer up, and divide the profits. Partnership can not be created by implication apart from the express or implied intention and there must be a community in the capital stock, profit and loss.

The authorities cited by appellee are not apposite for the reason that all, with the exception of one case cited, are concerned with the rights of third parties and the excepted case is founded upon a written contract, and the facts of the cases are generally dissimilar to those relating to the case at bar. It is unnecessary to direct the Court's attention to the fact that a different rule is to be applied where the interests of third parties are concerned than where the interests of the parties to an alleged contract of partnership are involved.

This alleged agreement does not match up to the allegations contained in the complaint to the effect that the parties had agreed to devote their entire time and attention to the partnership business and that they should furnish such sums of money as should be necessary to carry on its business. Dyer testified that this was the entire and only agreement of partnership and under the authorities cited by appellant in his brief it can not be held that such an understanding is sufficient to constitute a partnership.

Now, after that arrangement was made, these parties went to Texas. First, Dyer went to Texas,

and was followed by Doan. They had several independent transactions, and in those transactions you will find, from the testimony of the plaintiff, himself, that Doan was the "master mind", that he dictated the entire policy, and determined what property should be purchased, and determined what property should be sold, how much they should pay for these properties, how much they should sell them for. He was, as he said, the boss, and that testimony is not contradicted by Dyer. And you will find all through the transcript testimony by Dyer to the effect that whenever Doan told him to do anything he did it. And you must reach the inevitable conclusion, by virtue of these various transactions, which I cannot detail here now, that Doan was the employer, Dyer was the employee, and that Dyer was compensated for whatever service he rendered to Doan by a division of the profits whenever a transaction was completed. Doan advanced all the money in every transaction, with the exception of some small sums for attorneys fees, a very small initial payment, such as $500, when Dyer was in Texas and Doan was back here in California, which was in each instance returned by Doan to Dyer.

The acts of the parties and the manner in which the business was conducted in Texas show conclusively that the only agreement ever made between the parties, according to the testimony of Dyer, did not create the relationship of partners between the parties. This contention is further emphasized

by the fact that from the time the partnership is alleged to have been created in August, 1918, until May, 1919, each of the parties engaged in several independent ventures, Dyer testifying at page 94 of the transcript that he had independent dealings with W. L. Leland, and at pages 118 and 119 of the transcript where he testified as to independent dealings he had with Jergins in Archer County, Texas.

We wish again to refer to the testimony of the plaintiff who testified upon cross-examination at page 121 of the transcript.

> "We did not carry that land in the name of Doan & Dyer, or Dyer & Doan, and we never had any account in the name of Doan & Dyer, or Dyer & Doan. Only some of the bills around town, the garage bills, were called Dyer & Doan, or Doan & Dyer. We never had any bank account or common funds."

He talks about a little memorandum book he kept, a pitiful attempt to prove that there were partnership accounts; he could not produce it when asked to do so.

> "We never used any stationery upon which both names of Doan and Dyer appeared. I had a power of attorney from Doan, which was given to me shortly after the Bosque leases were issued. Those leases were sold in the name of Doan by virtue of that power of attorney. I was acting as his attorney in fact."

Never throughout this entire period was there a single transaction conducted in the name of the partnership of Dyer & Doan or Doan & Dyer; there

never was a community of capital, there never was a community of interest, there never was anything done by either of these parties in a partnership or any firm name, but in each instance each one of these deals was handled as I have outlined, by Doan dictating the policy and dividing the profits with Dyer as his compensation.

Now, in the light of the authorities which are cited in appellant's brief, the Court must hold that under the facts as they have been briefly outlined no partnership relation ever existed between the parties and that in order to create such a relationship there must be a community in the capital stock, there must be a community in interest, there must be an understanding that the parties will assume losses as well as divide profits. Doan took and assumed the entire risk in each one of these transactions. In one instance, Dyer made the initial payment of $10,000, but he testifies in the transcript, and it is not disputed, that that $10,000 was given him by Doan, and Doan paid the balance of that purchase price. This is all we shall have to say with respect to the oral contract.

We were surprised upon receiving appellee's brief filed in this Court to learn for the first time that in the face of the allegations contained in the complaint to the effect that the contract of partnership was wholly oral, which was held to be the fact by his Honor, Judge Rudkin, and in face of the decree prepared by counsel for appellee, that the agreement was evidenced entirely by an oral con-

tract, to find appellee at this late date undertaking to argue that the contract of partnership was evidenced by writing. Counsel for appellee predicated his argument to this effect upon certain letters passing between the parties and I intend to argue to this Court, just as I did in the case of the supposed oral contract, that if you take the testimony of Dyer at its full face value and assume that the contract is evidenced by these letters, that there is nevertheless nothing contained in all or any of these three letters which would justify the conclusion that the partnership relationship ever existed between the parties.

I want to refer, if you please, first to a statement made by counsel for appellee in his brief. All the way through the brief you will find them speaking about this "letter contract", and the contract having been established by reason of this correspondence that passed from Doan to Dyer, and on page 92, I think it is, of the brief, particularly the last page, where counsel sums up his case, he says:

> "In conclusion, we urge upon the Court the following facts:
>
> First, the letters written by Doan to Dyer establish a partnership relation; and these letters become a written contract, and this contract cannot be varied by the oral testimony of Mr. Doan, nor can it be varied by his later wirings or telegrams."

Now, I have not time to refer to that letter, except in a very general way; it is on page 111 of the transcript, I believe, but in that letter addressed

by Doan to Dyer, on August 9, 1918, he speaks about it taking big money to engage in the oil business. He says:

> "I have been thinking hard about the whole thing, and I have tried to make up my mind what is the best way to handle the situation, and I have about come to the conclusion that our first hunch was the best."

He talks about things moving fast in the oil business. He says:

> "Personally, I cannot afford to take a chance. We must first raise at least $100,000 before we can expect to do any business. It is all right to look the field over and get a line on propositions, but we must have the money."

Then he says,—this is very significant:

> "If they carry us"—the persons who were supposed to raise the money—"for 25 per cent and expenses, that is as much as we can expect."

And then he says:

> "I fully appreciate all you are doing. The information you are getting will be valuable."

Now, there is nothing in that letter, not one syllable in that letter, about any partnership. There is not one syllable in that letter about the division of any profits. There is nothing in that letter with reference to the assumption of any losses. There is nothing in that letter, with the exception of these expectations expressed by Doan, and the fact stated that if they can raise $100,000 that the parties who

carried them would not allow them more than 25 per cent of the profits.

Now, if you please, refer to page 218 of the transcript, and you will find there a second letter written by Doan to Dyer, but not in August, the time the contract was supposed to be executed or consummated, but on February 15, 1919, several months later, and in that letter there are certain references to some oil properties, but there is nothing there in that letter to the effect that there shall be a division of profits; there are none of the essential elements of a partnership found in that letter. And then they refer, if you please, to a telegram that was sent by a third party, Captain Lucey, to Dyer, the plaintiff in the case, prior to the time either of these letters were written, in which he suggests that the parties ought to get together and come down there to Texas.

Now their claim that there was a written contract is based on these three letters, and they argue at page 20 of their brief that if this contract is binding that these letters are conclusive as to Doan. Well, if they are conclusive as to Doan they are conclusive as to Dyer. I might end this argument here, so far as these letters are concerned, because I say there is no writing anywhere in the transcript to show a written acceptance of any offer that may possibly be found in any of these letters, or that these letters were the acceptance of any offer made by Dyer; and, of course, according to the rule that is invoked by counsel for the appellee, it will be necessary

for the contract to be evidenced completely by writing, but I am not going to rest upon any such elementary proposition, because I want this Court to understand clearly and distinctly that notwithstanding they claim this is the contract, and that all they can expect is 25 per cent of the profits, that you will find Dyer testifying at page 122 of the transcript that when they had a deal later on in Oklahoma, or in Texas, in which Mr. Doan had invested his money that:

> "While Doan did not tell me that I was going to have a half interest in the property, nevertheless I expected a half interest in that venture."

Now, the money was contributed by Titus, one-half by him, one-half by Doan, and yet Dyer, in the face of this "letter contract", if it were a contract, which would only entitle him to 12½ per cent, claimed 50 per cent of the profits that might accrue from that deal.

They argue that Doan did not put up a cent of money but you will find that Doan advanced the funds in Texas absolutely and conclusively all the way from the beginning down to the end, with the exception of $20,000 that was provided by Titus, and I want to ask counsel how he can suppose that Mr. Dyer is entitled to 50 per cent of the profit which might have accrued from the Texas deal, although it was apparent that he did not advance a cent, and that Titus and Doan contributed the money.

You will find, according to the testimony of Dyer on his cross-examination, that none of the essential elements of a partnership were anywhere present; you will find that different parties were interested in these different deals, Couch in the Oklahoma deal, Jergens in another deal, Titus in the deal to which I have referred, and that Doan went and obtained the money by a loan and invested the money in the ventures, he advanced whatever capital he had, and he advanced all of the money, and Dyer did nothing at all except as he was directed by Doan.

But the agreement, oral or written whatever it may be, claimed by appellee to have been made in August, 1918, and relating exclusively to Texas and to which we have referred as extending from August, 1918, to May, 1919, does not represent the important or crucial point of this case, because in May, 1919, the parties entered into an entirely different arrangement. Bear in mind, if you please, that the allegations of the complaint are that this partnership was formed for the sole and exclusive purpose of engaging in the business of acquiring, holding, and selling oil lands. Now, I am going to take two different views of this arrangement that was made in May, 1919. I am going to first refer to the testimony of Mr. Dyer, corroborated by his letters, and corroborated by the testimony of Mr. Carr. And I am going to show, according to that testimony, that there was a complete rescission or termination of any partnership agreement that might have been made, and I do not concede for

an instant that there was a partnership arrangement, but assuming, if you please, that their partnership existed up until May 30, 1919, I am going to argue that any such arrangement was cancelled and rescinded by mutual consent, as parties might do under the provisions of section 2449 and subdivision 2 of section 2450 of the Civil Code of this State.

Now, what happened at that time? According to the testimony of Mr. Doan, in May, 1919, he told Dyer that he had concluded that he would not continue operations in Texas, that the territory was deep, there was too great a risk attendant upon that sort of venture, that he had formed an arrangement with Mr. Titus and Mr. Lucey, and that Mr. Titus and Mr. Lucey were going to Louisiana and engage in the oil business at that point, and he said: "Our arrangements from here on will be on an entirely different basis", Captain Lucey proposed to Mr. Dyer that he become president of the North Texas Supply Company, a subsidiary of the J. F. Lucey Company, that he devote his entire time and attention to that business at Wichita Falls, Texas, at a salary of $500 a month, which would carry with it the conditional issuance to Dyer of some bonus stock of the Supply Company, Exhibit H, introduced by the defendant, will show that Mr. Dyer had in his own handwriting outlined the formation and operation of that corporation, that he subscribed to some capital stock of that corporation, and the uncontradicted

evidence shows that he became the president of the North Texas Supply Company, that he engaged in that venture at Wichita Falls, stayed there for a while, subsequently went to California, went to New York, made several trips to Pittsburg, wandered around the country, and in October of that year, while he was drawing a salary of $500 a month as president of the North Texas Supply Company he engaged in a venture with the American Oil Engineering Co., of New York, at a salary of $1000 a month, which was later increased to $1250 a month. That during this time he claimed the partnership continued, after May 30, 1919, Mr. Dyer did not devote one hour's time, according to his sworn testimony, to any activities of Doan in Louisiana; he did not contribute one cent of money to any of Doan's activities in Louisiana.

I want to read to you his testimony in that particular, if your Honors' please. I quote first from page 126 of the transcript:

> "I never invested one cent individually in any of these projects of Doan's"—

he did not say:

> "I did not invest any money in any partnership"—

but he said:

> "I never invested one cent individually in any of these projects of *Doan's.*"

Now, you will see he is referring to Doan's Louisiana venture, because after the arrangement was made between Doan and Dyer in May, 1919, Mr.

Doan went to Louisiana, and the uncontradicted evidence shows that he devoted his entire time to his Louisiana properties. In fact, it is complained by counsel in their brief that he devoted his entire time to the Louisiana venture in violation of his agreement wth Dyer. The fact is that Doan not only devoted his entire time and attention to that business in Louisiana, but Doan invested $100,000 of his own money in the Louisiana venture, and Dyer testified:

> "I never invested one cent individually in any of these projects of *Doan's*. I don't know how much money Doan invested in Louisiana, except that he told me that he had put in $100,000. I don't know how much he invested in Texas."

And again, at pages 122 and 123, you will find that Dyer not only did not invest any money in that venture, but he did not at any time spend an hour in that state. He said:

> "What Doan told me about Louisiana property is practically all I know",

and yet, in spite of the fact that he never went to Louisiana, he never spent an hour there, never contributed a cent to that venture, but on the other hand was acting as president of the North Texas Supply Co., and also as an employee of the American Oil Engineering Company, at a salary of about $1000 a month, he nevertheless claims that the partnership continued after that arrangement had been made with Doan in May, 1919.

As I have already suggested, Doan testified that his venture in Louisiana was going to be on an entirely different basis. By reason of the fact that no term was fixed in the claimed partnership agreements Doan had the right to terminate any partnership which existed at will. Not only does his testimony bear out our contention that any partnership relationship was terminated by him in May, 1919, but the acts of the parties which have been briefly related show that he did so. But this matter is set at rest by a letter addressed by Doan from Shreveport, La. to Dyer who was then, I believe, in Texas. This letter was dated October 12, 1919, and by referring to page 130 of the transcript it will be found that Doan stated in this letter:

> "While there is a big boom on here, I have not seen anything that I could recommend to your crowd, that we cannot handle ourselves."

He was speaking about Captain Lucey, and Mr. Titus, and their venture.

> "And, as I said before, I cannot afford to mix up with you on any outside deals in Louisiana."

There is no question about this letter. It was introduced by the plaintiff in the Court below, and that corroborates the testimony of Mr. Doan that he would not continue any arrangement that he had with Mr. Dyer, or it would be on an entirely different basis.

In fact, Mr. Louis Titus, of this city, testified, at page 202 of the transcript, that Mr. Dyer had

told him in August of 1919 that Mr. Doan had refused to permit Dyer to go to Louisiana. Subsequent to May, 1919, as we have already stated, the evidence shows conclusively that Dyer never invested one cent in Louisiana, did not even know what was going on there except what Doan told him. During this time he made arrangements with the American Oil Engineering Company to enter their employ; generally managed their business and spent considerable of his time in over-seeing that office and conducting the office which he had established at Fort Worth, Texas. After he had entered their employ he built a pipe line for them and handled some drilling business for them up at Wichita Falls; further than that, he established an office for them at Fort Worth, Texas, and he said that his time was engaged in overseeing the business in that office of the American Oil Engineering Co. at Fort Worth, and he said that in consideration they paid him a salary of $1000 a month, increased it to $1250, and he said in addition to that they counted him in, to use his language, as one of their family, and they were going to give him bonus stock, which was to be held in escrow.

Now, I won't take time to refer to other matters which shed some light on this matter, but I do want to impress this upon the Court, that I have been relating now the facts as they existed, where they are not disputed, except in so far as the arrangements which were made at Fort Worth in May, 1919, are concerned. Doan testified that he

agreed to carry Dyer for a contingent interest in the Louisiana venture, but he would expect Dyer to go and keep faith with Captain Lucey and handle the business of the North Texas Supply Company and form this drilling company, and engage in that business at Wichita Falls and stay there and remain there. Dyer, on the other hand, says that he did not have any such arrangement with Doan; that Doan was to continue on with the partnership. But now, what did he say in connection with that? I want to refer you again to his testimony, to the testimony of the plaintiff in this case, at page 117, and this is what he says the arrangement was that he made with Doan. He said:

> "Doan told me about when the Doan Oil Company was organized. After Titus had been there in company with Doan and Lucey, he came back to the Fort Worth Club, which was our headquarters, and said"—

just listen to this testimony, now, out of the mouth of the plaintiff in this case. He said:

> "We have arranged to make a $300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece."

Now, mind you, he does not say that the partnership has agreed to take one-third. He says that Doan told him:

> "We have arranged to make a $300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece."

Now, that corroborates and bears out the testimony of Doan that he undertook to carry Dyer for a contingent interest. You will find that all through this testimony, and I refer particularly to Exhibits C and F, letters written by Dyer to Doan, that Dyer consistently and persistently claimed one-sixth interest in the Doan Oil Company as his individual interest. He never at any time or place at all claimed that he had an interest in any partnership which owned the Doan Oil Company, until it came to the time that counsel for appellee wrote the brief in this case. All through the testimony you will find he claims this individual interest, and he says at page 119 of the transcript:

> "I have never received the one-sixth interest in the Doan Oil Company. I demanded it many times."

In the letters to which I referred, you see he was referring to "my interest in the Doan Oil Company". So, I say, that so far as any partnership arrangement after May, 1919, is concerned, it is disproved by the testimony of Mr. Doan, Mr. Titus, Mr. Carr, and by the testimony of the plaintiff, himself. It is inconceivable that this man would have been constantly claiming a one-sixth undivided interest in a corporation which had been formed by these other parties who were not parties to the agreement between Doan and Dyer unless the fact was, as testified by Doan, that Doan was carrying Dyer for a contingent interest in Doan's Louisiana venture and not as a partner within the terms of

the partnership sought to be proved by Dyer orally and not within the terms of the partnership sought to be proved by his counsel by means of the letters upon which counsel relies. Dyer did not consider that he was a partner. This is shown by his acts. He was engaged in the business of managing the North Texas Supply Company, a supply business; he was engaged, as I have suggested, as an employee of the American Oil Engineering Company all during this time, receiving a salary from these two companies. I am in error. He did not receive a salary from the American Oil Engineering Company until October of that year, or November of that year, but the fact remains that while Doan had invested $100,000 of his own money in Louisiana and devoted his entire time to that territory, that Dyer had never, according to his own testimony, invested one cent, and he had never spent an hour in that territory; he did not do anything in connection with Doan's Louisiana venture. He was getting money on the outside, and, according to his own testimony, when he was asked what he did with that money, whether he ever tried to make a contribution to the partnership from money he testified he could borrow:

> "No, I spent my money, I dissipated my money in living."

Those are the facts, and it is inconceivable that it can be held that under such facts the parties bore the relationship of partners.

Counsel for appellee argued before the Trial Court and has argued in his brief filed in this Court that the many letters introduced by plaintiff in the Court below prove that a partnership existed. I ask counsel to show in any one of these letters the mention of the word "partner", the mention of the word "partnership", the definition of any of the interests of the partners, a reference to any common stock or capital stock, a reference to any profits that they should receive, or any losses that they would sustain.

Now all of these letters are easily explainable when consideration is given to the fact, as was suggested by counsel for appellee in his brief, of the "long-time friendship between Doan and Dyer". This friendship is proved by the evidence which shows without conflict that Doan had loaned Dyer as much as $12,000, had established credit for him at San Francisco and Oakland banks, and had carried him along and endeavored to make a man of him. These letters were written by one friend to another Doan endeavoring to keep Dyer advised of the progress of his Louisiana venture, Dyer being naturally interested because, as he himself testified, Doan was carrying him for a one-sixth interest in Doan's Louisiana investment.

In reading Doan's letters you will find him importuning Dyer constantly to do better, to go straight, to make a man of himself and attend to business, and to quit chasing rainbows, as he says. And you will find that these letters all relate to

activities in which Doan was concerned, and speak of the activities of Dyer, but not one of these letters has any reference to any partnership, or any of the elements essential to create a partnership; and while counsel undertakes to make a great deal of the fact that he employs "we" and "our" in these letters, if these letters are reviewed you will find that when he speaks of "we" and "our" he is referring to Titus and Lucey, with whom he was associated in his Louisiana venture.

Now, time is passing very quickly, but I wish, if your Honors please, to refer to page 86 of counsel's brief, in which he says,

> "The complainant is not endeavoring to prove that he is a partner with Lucey and Titus, but merely that he is a partner with Doan, and that Doan holds stock in the Doan Oil Company in trust for Dyer. Titus and Lucey are not parties to the suit at bar."

I want, if you please, to just have the court, when they come to consider this case, refer to the authorities cited by appellee in their brief, and I want the Court to examine these authorities and then apply this test. It is a simple test and a conclusive test. If under these authorities Titus and Lucey were not partners with Doan and Dyer, when they had a common fund, when they all had their interest measured by the amount of their investment, when they had agreed and did buy the property in which they were jointly interested, I want to ask how counsel is going to reconcile appellee's contention that under the facts as they related to

the relationship between Doan and Dyer it can be held that the parties to the controversy were partners. The indisputable facts show that as far as the relationship between Doan, Titus and Lucey is concerned there was a community of interest, an agreement to share the profits and loss, that they each contributed a specified amount of funds to the venture and that their interests were measured by the amount of their contribution, whereas all the essential elements of a partnership, as has been suggested, are lacking whether you consider the case here upon counsel's first theory that there was an oral agreement of partnership, or upon his later theory that the partnership was evidenced by a writing.

Why weren't Titus and Lucey made partners when Titus had a 50 per cent interest and Lucey had one-sixth interest, and Dyer and Doan, according to the testimony of Dyer, had a one-sixth interest apiece? Why wasn't that claimed as a partnership? I will tell you why that was not claimed as a partnership, because it would have been very inconvenient for this complainant to come into Court and prove a partnership relation between these parties, because it could not have been established without their consent, and if he had attempted to come into this Court and make any such proof, he would have been met and confronted by the evidence of these parties that no such partnership existed. But you will find, when you read these letters, that it means nothing more than that

he undertook, for the purpose of making a small sum of money for himself, which developed into a large sum before he got through with his accounting, that he claimed a partnership existing between Doan, that he imposed upon this life-long friendship, so characterized by his counsel, that he hoped to create a relationship which would enable him to profit by a venture in which Doan was solely and exclusively interested, in which he had invested his entire capital, and to which he had devoted his entire time. That is why they didn't enlarge the scope of this partnership and bring in these other parties.

Now, while it is claimed by Doan that he agreed to carry Dyer for a contingent interest, and while Dyer, on the other hand, says that he did not remember Doan ever agreeing to carry him for an interest, nevertheless the fact is, according to his own testimony, that he claimed a one-sixth interest, and did not put in any money, which means Doan must have carried him for that one-sixth interest, whatever it was. If his testimony is to be given any credence at all, if that be so, there must have been some consideration for Doan carrying him, because Dyer did nothing with reference to Louisiana, invested no money in Louisiana. And what was that consideration? Why, it must have been that Mr. Dyer was to fulfill his obligation that he made with Captain Lucey, and go up and manage the business of the North Texas Supply Company, but he did not manage that business, but the evidence will show, and his

own letters will show, and the letters written to him by Doan will show that he was traveling around the country aimlessly, engaged in other business, and in connection with the business of the American Oil Engineering Company. If there was any partnership it was terminated, in May, 1919, by the mutual consent of the parties, and their acts and their letters show that it was terminated. It must be held that Dyer had not a vested interest of a partner, but he had a contingent interest, and that interest for which Doan was carrying him was contingent upon him accomplishing something substantially for Doan. But when you examine the account and find that Doan invested $100,000 and devoted his entire time to that business, and see the pitiful account submitted by Dyer, which shows not a single cent invested after May, and a pitiful $263.50 invested before that time, you must find that there has been an entire failure of consideration, there is a want of mutuality, and that contingent interest cannot be made the subject of any decree which will give to Mr. Dyer any part of the profits which were earned by Mr. Doan.

I have occupied so much time, and I want to save a few minutes in reply, that I do not propose at this time to make any argument with reference to the accounting. There are two main questions involved. They are argued fully in the brief, one in relation to the interest, and one in relation to the second issue of stock of the Doan Oil Company, and the facts are complicated, and it would only tire the

Court if I should undertake to argue those matters at this time, and I should like to retain the additional ten minutes for reply.

Closing Argument.

Mr. DURBROW. In the very few minutes remaining, I would like to contrast the viewpoint of both parties. We have a situation which appears in this way, that according to the testimony of the complainant, himself, an oral contract was executed relating exclusively to Texas. It is conceded at page 18 of counsel's brief that the partnership was formed for the purpose of sending Dyer to Texas. The testimony of the plaintiff in the action was that the contract related exclusively to Texas. After that claimed oral contract had been executed, the parties went to Texas and engaged in these several ventures, and, as has been shown in each instance, Doan was the principal, dictated the policy, advanced the money, and Dyer was following his directions in all instances. We find that according to the terms of the claimed written contract, that Mr. Dyer claimed a 12½ per cent interest, but nevertheless claims a 50 per cent interest when it comes to a settlement on any transaction, showing that the written contract was modified by the parties at least to that extent. Their relations from August, 1918, to May, 1919, as I have suggested, are not particularly important except as it throws light

on subsequent events, for the reason that at the close of each transaction the parties divided whatever profits there might be, and no matter what that relationship was the principal point in controversy relates to the period subsequent to May, 1919. The fact appears and it is not disputed in the brief and has not been denied by counsel in argument, that Dyer testified that Doan told him that a $300,000 pool was going to be formed, so far as Louisiana was concerned, that each one of the parties was to have a sixth interest. Their conduct subsequent to that time was entirely consistent with the testimony given by Doan, that he intended to carry Dyer for an interest, but he did not say a one-sixth interest, but an interest in consideration of Dyer discharging these other obligations which he had incurred to Captain Lucey and himself. It is entirely consistent because, according to the pleadings, themselves, at that time, they departed from the purposes of the partnership and discontinued dealing generally or in any way in oil lands, Dyer undertaking the management of the North Texas Supply Company and later engaging in the service of the American Oil Engineering Company, and devoting all of his time to these endeavors, whereas Doan continued on in the oil business.

Doan's accounts show that he actually invested $100,000 of his own money in his Louisiana venture, counsel's contradiction to the contrary notwithstanding. This was found to be a fact by the Master. The account of Dyer, found at page 384

of the transcript, makes a pitiful showing in contrast and outside of the disputed expense account shows that Dyer did not invest a single cent in Doan's Louisiana venture. The uncontradicted evidence further shows that Doan devoted his entire time to acquiring and developing the properties in Louisiana and that Dyer did not devote an hour's time to Doan's ventures. It must be held that there was an entire change in the relations between the parties beginning May 30, 1919, for the reason, as has been suggested, that Doan continued on with his business, devoting all of his time and all of his money to that business, Dyer, on the other hand, supplying no money, devoting not an hour's time to that venture, going out and engaging in two different enterprises for two different corporations entirely dissociated with the business in which they had formerly been engaged. We find Dyer constantly, all through his testimony, in all the letters that were read by counsel, claiming a one-sixth interest, but never a suggestion as to the contribution to any partnership fund; and we find there never was any partnership fund, any joint account, any bank account, any business conducted in the name of Doan and Dyer.

Now, that is the case so far as the appellant is concerned. What is the case of the appellee? This is the contrast I want to make for your Honors: It is that because of certain letters written by Doan to Dyer during the time Doan was engaged in handling his own Louisiana venture, he gives Dyer infor-

mation relating to these projects. Why it is a perfectly natural thing for him to do. As has been said by counsel, there was a life-long friendship. According to Mr. Doan, he was carrying Mr. Dyer for an interest; according to the testimony of Mr. Dyer he had a one-sixth interest. There was no conflict in the testimony, so far as that is concerned, and if that be so it was a perfectly natural thing for Doan to continue to write these letters to Dyer. And then, outside of these letters, what do we find? A few statements, desultory in the extreme, to the effect that the parties were interested together, that they were associated together, and that some day somebody might see their names on some oil cars. There is set forth in the brief a few disjointed excerpts of these letters taken out wherever there is a "we" and "our" referred to, but you will find, by referring to these letters, that Doan is referring to his associates at that time—Titus and Lucey—all through that correspondence.

We ask this Court to contrast the case made by appellant on the one hand and appellee on the other, and apply this conclusive test: If Doan had sustained a loss because his Louisiana venture had resulted in a failure and debts had accrued, which Doan was obliged to discharge, could Doan under the evidence contained in the transcript have come into Court and required Dyer to share these losses? I believe that if the Court will apply this test the conclusion will inevitably be reached that a partnership was never contemplated by these parties and

that under the authorities no partnership can be found to have existed at any time or in any event subsequent to May 30, 1919, and that the Court will conclude that the appellee in filing this suit has endeavored because of his inability to pay for his one-sixth interest, as appears from the letters which he addressed to Doan, known as exhibits C and F, without having to surrender one-fourth of this stock, and that when he found he was obliged to surrender his claimed one-sixth interest in the Doan Oil Company in order to obtain the $50,000 to pay Doan for his interest he conceived the idea of instituting this action and claiming a partnership. In none of the numerous letters and exhibits introduced by plaintiff could there be found a single word or a single sentence relating to a partnership or any contention that the parties bore the relation of partners, or that they contain any of the essential elements to show that a partnership at any time existed.

I believe that if you will apply that test you will find that according to the evidence in this case, whatever the relationship of the parties may have been, there was a severance or a discontinuance of this relationship on May 30, 1919, and that at that time Dyer was given a contingent interest in the Doan Oil Company, in consideration of him assuming the presidency of the North Texas Supply Company and discharging those obligations and earning the money in which Doan expected to profit to some extent, and you will find, according to his own testi-

mony, and according to his own letters, and according to the letters that he said he received from Doan, which he introduced in evidence, that he was wandering around the country, that he failed entirely to discharge the obligations which he had assumed, and that there was a failure of consideration, there was no mutuality, and that he cannot claim that contingent interest, should be sustained by a judgment of this Court.